IN THE

Supreme Court of the United States

OCTOBER TERM, 1964

No. [redacted] 42

RALPH GINZBURG, DOCUMENTARY BOOKS, INC., EROS MAGAZINE, INC., LIAISON NEWS LETTER, INC.,
Petitioners,

v.

UNITED STATES OF AMERICA, *Respondent.*

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

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To the Honorable the Chief Justice of the United States and the Associate Justices of the Supreme Court of the United States:

Petitioners pray that a writ of certiorari issue to the United States Court of Appeals for the Third Circuit to review the judgments of that court entered November 6, 1964, affirming petitioners' convictions for mailing obscene material under 18 U.S.C. § 1461. Petitioner Ginzburg was fined $28,000 and sentenced to five years imprisonment. The corporate petitioners were fined a total of $14,000 (JA 376-379).[1]

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[1] The letters "JA" refer to the Joint Appendix printed for the use of the court below.

OPINIONS BELOW

The opinion of the Court of Appeals has not yet been officially reported but is set out in Appendix "A", *infra,* pp. 1a-10a. The opinion of the District Court (JA 354-368) is reported at 224 F. Supp. 129.

JURISDICTION

The judgments of the court below were entered on November 6, 1964. On November 27, 1964, Mr. Justice Brennan granted an extension of time to file this petition to January 5, 1965. Jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

QUESTIONS PRESENTED

1(a). Does the Federal obscenity statute, 18 U.S.C. § 1461, prohibit the mailing of a literary work dealing with love and sex which the Government concedes is not "hard-core" pornography?

(b). If so, does the Federal obscenity statute violate the First Amendment's guarantee of freedom of press and expression?

(c). Is the Federal obscenity statute unconstitutionally vague and uncertain even when limited to "hard-core" pornography?

2(a). Where a literary work is devoid of material which is erotically stimulating to the average person, can that work "appeal to prurient interest"?

(b). Where portions of a literary work are erotically stimulating to the average person, but the work does not induce in such person morbid or shameful sexual desires, can that work "appeal to prurient interest"?

3. Can a conviction under 18 U.S.C. § 1461 be sustained where the literary materials found to be "obscene" are less offensive in their description or representation of sex than other literary materials in widespread current circulation?

4(a). When a literary work dealing with sex advocates ideas, can it be deprived of First Amendment protection because experts disagree as to its "usefulness"?

(b). When substantial portions of a literary work are of uncontroverted social importance, can it be deprived of First Amendment protection because the trier of fact believes that other portions are obscene?

5. In determining whether material is obscene, can the trial court receive and consider testimony of the effect of such material on adolescents?

6(a). Where four defendants are jointly indicted and tried for non-related obscenity offenses and evidence of one defendant's alleged intent to appeal to prurient interest is used to support conviction of all defendants on the theory that they engaged in a "general scheme and purpose" to commercially exploit obscenity, may the appellate court disregard the erroneous transfer of such intent and affirm all four convictions on the theory that each defendant knew the contents of the mailed material?

(b). Is the fact that a defendant commercially exploits a literary work for a profit a relevant consideration in determining whether that work is "obscene" under 18 U.S.C. § 1461?

7(a). Where defendants make a timely request for special findings of fact under Rule 23(c) of the Fed-

eral Rules of Criminal Procedure, may the trial court enter a general finding of "guilty on all counts", instruct the prosecutor to prepare special findings, and adopt the prosecutor's findings (proposed *ex parte*) fifty-four days after finding defendants guilty?

(b). Where, in making findings of fact under Rule 23(c) of the Federal Rules of Criminal Procedure, the trial court fails to find essential elements of the crime, may the court of appeals supply the missing findings by inferring their existence from other findings and from the trial court's opinion?

CONSTITUTIONAL PROVISIONS, STATUTE, AND RULE INVOLVED

The Constitutional provisions involved are the First, Fifth, and Sixth Amendments to the Constitution of the United States. The statute involved is 18 U.S.C. § 1461. The rule involved is Rule 23(c) of the Federal Rules of Criminal Procedure. Pertinent portions of the constitutional provisions, statute, and rule are set forth in Appendix "B", *infra.*

STATEMENT OF THE CASE

A. PROCEEDINGS BEFORE TRIAL

On March 15, 1963, the Grand Jury returned a twenty-eight count indictment charging petitioners with eighteen counts of mailing obscene publications and ten counts of mailing advertisements for these publications in violation of 18 U.S.C. § 1461 (JA 6-13). The alleged obscene publications were Eros, Vol. 1, No. 4 ("Eros"), The Housewife's Handbook on Selective Promiscuity ("The Handbook"), and Liaison, Vol. 1, No. 1 ("Liaison"). Before trial, the par-

ties stipulated, *inter alia,* that (1) petitioners mailed the challenged publications knowing the contents thereof and (2) the indictment charged that Eros, the Handbook, and Liaison were each "obscene when considered as a whole" (JA 148-150). The trial began on June 10, 1963, before the District Court (Body, J.), sitting without a jury.[2]

B. THE TRIAL

1. The Government's Evidence

After petitioners' stipulations acknowledging mailing of the three works with knowledge of their contents had been placed on the record (JA 149-150, 152), the Government called the postmaster of Blue Ball, Pennsylvania (JA 152). This witness testified, over objection (JA 154-155), that on October 18, 1962, Frank Brady, Associate Publisher of Eros Magazine, Inc., wrote him a letter stating that "[a]fter a great deal of deliberation, we have decided that it might be advantageous for our direct mailing to bear the post mark of your city" (Ex. G1, JA 155). The postmaster of Intercourse, Pennsylvania testified, over objection (JA 157), that she received a similar letter dated September 4, 1962, also signed by Frank Brady (Ex. G2, JA 157-158).

The postmaster of Middlesex, New Jersey, testified that each of the three corporate petitioners mailed their publications from his post office (JA 160-162) and that all of these mailings were handled by the General Mailing Corporation of Middlesex, a mail order house so large that it had a post office substation on its own premises (JA 162-164).

[2] A waiver of a jury trial was filed on June 10, 1964 (JA 2).

John Darr, a discharged employee of Liaison News Letter, Inc. (JA 173, 183), testified as to the authorship and makeup of Liaison (JA 178-183), after which the Government introduced into evidence the three challenged publications (JA 184-185, Exs. G16-G18). At this point, the Government rested (JA 185), and the court denied petitioners' motion for acquittal (JA 186).

2. Petitioners' Evidence

(a) Eros

Petitioners' first witness was Dr. Charles G. McCormick, an eminent clinical psychologist (JA 186-188).[3] Dr. McCormick testified that although there were some passages in Eros that might be erotically stimulating (JA 212-214), those passages would not induce in the average person a morbid or unhealthy attitude toward sex (JA 214),[4] and that the predominant effect of Eros would not be to stimulate in the average person any morbid or shameful sexual desires.

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[3] Dr. McCormick is certified by the States of New York and California, a member of the Editorial Board of the International Journal of Group Psychotherapy, a Fellow of the American Group Psychotherapy Association, a holder of a doctoral degree from Columbia University and for sixteen years a member of the teaching staff of the New York School of Social Work, a Columbia affiliate (JA 186-188).

[4] Dr. McCormick began his testimony by describing pornographic material (JA 188-196). He explained that pornography produces in the average reader "both the sense of pleasure and the sense of guilt or shame" (JA 188). The witness testified that pornography is sexually stimulating to most people and that an absence of erotic response to such material would be symptomatic of physical or psychological illness (JA 193). Dr. McCormick described the difference between the average healthy male's response to pornography and his response to an attractive nude woman, testifying that in the latter case a healthy male would be erotically stimulated but without feelings of shame or guilt (JA 193-196). He then identified various books and pamphlets as pornography and this material was introduced in evidence (Exs. D1-D8, JA 196-199,

Dr. Peter G. Bennett, M.D., a practicing psychiatrist and teacher of psychiatry at the University of Pennsylvania Medical School (JA 256-257), testified that while the average person who read Eros might find some "occasional sexual stimulation" (JA 265), the predominant effect of Eros was *not* to create any morbid feelings of shame and guilt (JA 259-260, 264-265).[5]

Dwight Macdonald, the distinguished literary critic and commentator on American culture (JA 227-230), testified at length on the customary limits of candor with respect to descriptions and representations of sex (JA 230-235). According to Mr. Macdonald, Eros did not go substantially beyond those limits and, in fact, was considerably within them (JA 237-238). Mr. Macdonald also testified that a number of the articles in Eros were of considerable literary merit (JA 238-240).

Professor Horst Janson, Chairman of the Fine Arts Department of New York University, a recipient of two Guggenheim Fellowships, author of many articles

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201). Dr. McCormick commented that the average person would be both revolted and sexually stimulated by reading those books and pamphlets (JA 202) and contrasted such material with "Lady Chatterley's Lover", stating that while both are sexually stimulating, the impact on the mind of the ordinary individual would be radically different. "['Lady Chatterley's Lover'] will not be destroying, tearing, as this material will" (JA 203-204). The distinction, he pointed out, was that "hard-core" pornography, such as "The Autobiography of a Flea" (Ex. D7), engrossed the average reader in a sense of being both soiled and pleased (JA 205-206).

[5] Dr. Bennett contrasted the effect of pornography on the average person, stating that it "is not simply an intense stimulation of erotic feelings. It includes this, of course, but erotic stimulation of itself is definitely not harmful or disturbing to the ordinary mature adult, whereas pornography has, always, in addition, a disturbing disintegrative influence even on the mature person which is almost impossible to resist and which abrades the conscience causing morbid feelings of shame and guilt" (JA 259-260).

and books on the history of art, and Editor-in-Chief of "The Art Bulletin", official journal of the College Arts Association of America (JA 218-219), testified as to the artistic merits of Eros as a whole (JA 221-222). According to Professor Janson, the Eros photographs of a nude man and woman which particularly disturbed the trial court (JA 364) were "outstandingly beautiful and artistic photographs. I cannot imagine a theme being created in a more lyrical and delicate manner than it has been done here" (JA 221). Professor Janson also testified that "in terms of the material contained therein, the terms of the graphic lay-out and the taste displayed in the presentation of this material, [Eros] is certainly the equal of any magazine being published today" (JA 222).

On summation, the Government conceded that Eros was not "hard-core" pornography (JA 349).

(b) Liaison

Dr. McCormick, the psychologist, testified that the predominant effect of Liaison was not to create in the average person an "itching, morbid or shameful desire or longing with respect to sex" (JA 215). In fact, Dr. McCormick stated he found nothing sexually stimulating in Liaison for the normal person and that only an abnormally ill person could be sexually stimulated by Liaison's content (JA 215). Dr. Bennett, the phychiatrist, testified that Liaison would create no morbid, shameful or licentious thoughts in the average person and that there was nothing in Liaison which could in any way sexually stimulate the average person (JA 265-266). Dwight Macdonald testified that Liaison did not go substantially beyond customary limits of candor and was within the limits of sexual discussion found in other material freely available in the United States (JA 236-237).

(c) The Handbook

Mrs. Lillian Maxine Serett, author of the Handbook, testified that it was a completely factual autobiography (JA 227) and that her purpose in writing it was to communicate to lay persons the ideas that (1) various forms of sexual expression are normal and healthy and (2) women should have the same sexual rights as men (JA 226). She testified that since September 1960 (several years prior to petitioner Ginzburg's mailings) she had mailed thousands of copies of the book and that it had been purchased and used by doctors, ministers, and at least one medical school (JA 225-226).

Dwight Macdonald testified that the Handbook did not go substantially beyond the customary limits of candor that American society now permits in its literature (JA 235-236), and that the Handbook's sexual descriptions were less explicit than those of "Lady Chatterley's Lover" (JA 236), which he said was freely sold throughout the United States (JA 232).[6]

Dr. McCormick testified that the Handbook "would be quite useful as an educational instrument" (JA

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[6] Arthur J. Galligan testified concerning books and magazines that are sold from open stands and shelves at newsstands and bookstores at the Grand Central Terminal in New York City; in the vicinity of the New York Public Library at 5th Avenue and 42nd Street, at 6th Avenue and 42nd Street, New York City; at the southeast corner of 15th and Market Streets in Philadelphia; at Ranstead and 15th Streets in Philadelphia; at 11th and Chestnut Streets in Philadelphia; and on Market Street near the Court House (JA 242-253). Books and magazines which Mr. Galligan had purchased at these locations were introduced into evidence as Exs. D10-D43 (JA 256). The courts below (JA 367; App. "A", *infra*, pp. 4a, 6a) disregarded this and all other evidence (JA 230-239) of the contemporary standard and sustained petitioners' convictions for mailing literary materials which were clearly less offensive than other materials (Exs. D9-D43) in widespread circulation.

216) and, in response to the question whether the predominant effect of the Handbook was "to create in the average person an itching, morbid or shameful desire or longing with respect to sex" (JA 206), he said: "No, it is not. That is the distinction between pornographic and erotic material. The distinction * * * is that the pornographic material is morbid, does tend to corrode and to turn the person against himself in the process of reading or seeing. In the case of 'The Handbook', this effect will not take place for the ordinary person reading it" (JA 210). Dr. Bennett's testimony was substantially the same (JA 259-263, 264, 273).

Rev. George Von Hilsheimer, III, a Baptist minister trained and experienced in clinical psychology (JA 273)[7] testified that he had used the Handbook in pastoral and psychological counseling since 1960 (JA 289). He said that the book was particularly valuable in dealing with the problems of married women who were guilt-ridden by their sexual values and experiences (JA 289). He stated that the book communicated

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[7] Reverend Von Hilsheimer studied theology and psychology at Washington University in St. Louis, the University of Miami, and the University of Chicago (JA 274-275). His training in psychology included extensive clinical activities at the Child Guidance Center in Lincoln Park and at the Association for Counseling and Therapy (JA 274). Reverend Von Hilsheimer has lectured extensively in universities and theological schools on such subjects as comparative religion, contemporary morals, education and therapy (JA 275). He is resident minister and group counselor for the Greater New York Humanist Council and is Executive Director of the Fund for Migrant Children (JA 275-277). Reverend Von Hilsheimer was also a ministerial conselor to the President's Study Group on National Voluntary Services and a board member of Mobilization for Youth, the first project established by the President's Committee (JA 276). His professional activities involve substantial contacts with underprivileged and culturally deprived persons in both urban and rural areas (JA 276, 277).

to such a reader the fact that her sexual attitudes were not unique and thereby tended to relieve guilt feelings. He considered this to be the book's most important value and added that it was more useful to him than standard marriage manuals (JA 292).

3. Rebuttal

The Government called three rebuttal witnesses to show that the Handbook had no social-scientific value.

Dr. Nicholas G. Frignito, Chief Psychiatrist of the County Court of Philadelphia (JA 316-317), testified that, in his opinion, the Handbook had no medical value and was "obscene" (JA 318-319). He stated that he thought the book a "menace" and that it "can lead to a lot of chaotic situations, because my interpretation of the book, it fosters promiscuity. It fosters sexual perversity" (JA 320). Over petitioners' continuing objection (JA 321, 322, 323), Dr. Frignito was permitted to testify as to the effect of the book upon adolescents stating that "it certainly is a very dangerous thing" and that "this type of book" encourages delinquency in adolescents because "it would lead to self-abuse, masturbation, and that * * * would lead to other types of sexual activity" (J.A. 320-324).

Dr. Ann Hankins Ford, M.D., a practicing psychiatrist (JA 335-336), testified that, in her opinion, the Handbook had no medical value in the field of psychiatry or psychology (JA 337) and that it would be disturbing, rather than helpful, in the treatment and counseling of her patients (JA 338). On cross-examination, Dr. Ford characterized her patients as "people who were disturbed in one way or another" (JA 339). Rev. Adolph E. Kannwischer, a Baptist minister (JA 342), testified that he would not use the Handbook in

pastoral counseling because he regarded it as "detrimental to a person who already is having problems" (JA 344).

Petitioners moved for a judgment of acquittal (JA 344, 345) which was denied (JA 348). Petitioners then requested that the court make special findings of fact in accordance with Rule 23(c) of the Federal Rules of Criminal Procedure (JA 348). The following morning, the trial court entered a general finding of "guilty on all counts" (JA 349), and stated it would find the facts specially as requested by petitioners' counsel. The trial court said:

> "At the earliest possible time they will be found. Meanwhile, I would like to request the Government through Mr. Creamer to submit to me proposed findings" (JA 349).

Mr. Creamer was not directed to serve a copy of the Government's proposed findings on petitioners' counsel, nor, of course, was petitioners' counsel asked to submit proposed findings in support of the general finding of guilty.

C. PROCEEDINGS AFTER TRIAL

On June 27, 1963, petitioners filed a timely motion in arrest of judgment or, in the alternative, for a new trial (JA 350) urging, *inter alia,* that the trial court found petitioners guilty without making findings of fact as required by Rule 23(c) of the Federal Rules of Criminal Procedure. Sometime thereafter, and prior to answering petitioners' motion, the Government gave the trial judge its proposed findings of fact. The proposed findings were neither filed in the docket nor served upon petitioners' counsel. On August 6, 1963, fifty-four days after petitioners had been found guilty

on all counts, the trial court filed special findings of fact (JA 351-353). The Government then filed its answer to petitioners' motion in arrest of judgment or for a new trial, and approximately three months later, the trial court filed an opinion (JA 354-368) denying the motion. The opinion specifically incorporated the court's previously made Special Findings but a portion denominated as "Discussion" added new and additional ones.

On December 19, 1963, the trial judge sentenced petitioner Ginzburg, a first offender, to five years imprisonment[8] and a fine of $28,000, and fined the corporate petitioners a total of $14,000 (JA 373-376). A notice of appeal was filed the same day (JA 380).

On November 6, 1964, the Court of Appeals affirmed petitioners' convictions (App. "A", *infra,* pp. 1a-10a).

REASONS FOR GRANTING THE WRIT

Although 1,037 persons were charged with violations of the Federal obscenity statute (18 U.S.C. §§ 1461-1465) in the past four years, and in 1964 federal obscenity prosecutions were double those of 1961,[9] the statutory standards remain obscure and speculation continues unabated. Kurland, *The Supreme Court, 1963 Term,* 78 Harv. L. Rev. 143, 208-209 (1964).[10] Is

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[8] Ginzburg received three years on the Handbook counts and two years on the Eros counts, the sentences to run *consecutively.*

[9] *Admin. Off. of U.S. Courts Ann. Rep.,* Table D-4 (Fiscal 1961-Fiscal 1964). Prior to fiscal 1961, the annual report did not contain a separate "obscenity" tabulation.

[10] Since there was no issue in *Roth* v. *United States,* 354 U.S. 476, as to the obscenity of the challenged materials (*id.* at 481, ftn. 8), "the Court * * * had no occasion to explore the application of a particular obscenity standard." *Manual Enterprises* v. *Day,* 370 U.S. 478, 489.

the Federal obscenity statute constitutionally limited to "hard-core" pornography? Is "prurient interest appeal" equivalent to erotic stimulation? Is a literary work which deals with sex in a manner that advocates ideas constitutionally protected despite expert disagreement as to its social importance? These and other questions vitally important to the future administration of the federal statute are all presented for review. The decision below is not only in conflict with decisions in other circuits and with applicable decisions of this Court but, if the opinion of the court of appeals is allowed to stand as a guide to future prosecutions, it will wreak havoc in the administration of 18 U.S.C. §§ 1461-1465. Ever since *Roth* v. *United States*, 354 U.S. 476, this Court and state and federal courts have all been grappling with the problem of "obscenity". The many questions petitioners raise (some of which require little or no discussion in this petition)[11] and the solutions which can be achieved on this record will go far toward eliminating the present confusion.

Apart from those questions directly involving administration of the Federal obscenity statute, petitioners seek review of important questions of federal criminal law. The practice of switching theories on appeal in order to sustain convictions, the manner in which the trial court made its findings, and the supplying on appeal of missing, but essential, findings by inferring them from other findings, would in an ordinary criminal case be of sufficient national importance to call for the exercise of this Court's certiorari jurisdiction. How much

[11] See Questions Presented Nos. 1(b), 1(c), 2(a), 3, and 6(b). Although petitioners recognize that they have presented many more questions than is normally appropriate, the court below in its effort to sustain petitioners' convictions committed many errors of substantial importance which petitioners are constrained to raise.

more important are they in this, a First Amendment case, which requires "the most rigorous procedural safeguards", *Bantam Books, Inc.* v. *Sullivan,* 372 U.S. 58, 66?

A. The court of appeals held (App. "A", *infra,* pp. 5a, 6a) that 18 U.S.C. § 1461 prohibits use of the mails to sell Eros a publication dealing with love and sex which the Government conceded was not "hard-core" pornography. This holding is in direct conflict with the holding of the Court of Appeals for the First Circuit in *Excellent Publications* v. *United States,* 309 F. 2d 362, 365 (1962), in which the publication "The Gent" was held not to be "the kind of 'hard-core pornography' within the reach of the statute construed in the light of the constitutional guarantee of freedom of the press." It is also in conflict with the holdings of the highest courts of New York,[12] California,[13] and Massachusetts.[14] The question "[w]hether hard-core pornography, or something less, be the proper test" was left open in *Manual Enterprises* v. *Day,* 370 U.S. 478, 489, and should be decided now.

Petitioners believe with Mr. Justice Harlan (*Roth,* 354 U.S. at 507-508) and Mr. Justice Stewart (*Jacobellis* v. *Ohio,* 378 U.S. 184, 197) that the Federal obscenity statute is constitutionally limited to "hard-core" pornography, provided that term is capable of definition. Petitioners' definition embraces the concepts enunciated by Drs. McCormick (JA 188-199, 202-206, 210) and Bennett (JA 259-263) in the trial court

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[12] *People* v. *Richmond County News Co.,* 9 N.Y. 2d 578, 586.

[13] *Zeitlin* v. *Arnebergh,* 59 Cal. 2d 901, 31 Cal. Rptr. 800, 811.

[14] *Attorney General* v. *The Book Named "Tropic of Cancer",* 345 Mass. 11, 184 N.E. 2d 328, 333-334.

and the Solicitor General's description in *Roth* v. *United States,* 354 U.S. 476 (Br. 37-38). This "should provide a reasonably satisfactory and workable tool * * *." Lockhart & McClure, *Censorship of Obscenity: The Developing Constitutional Standards,* 45 Minn. L. Rev. 5, 65 (1960). The problem, of course, is to enunciate a workable standard. If, on this record, a workable standard cannot be evolved, it can never be, and 18 U.S.C. § 1461 is hopelessly vague and uncertain.

B. The record made in the trial court establishes that the predominant effect of the challenged materials was *not* to create in the average person any morbid or shameful sexual desires (JA 206, 210, 211-212, 215, 264-266, 273). Nonetheless, the courts below held that all these publications were obscene. The problem here (and the one which may have caused the erroneous holding below) is that this Court did not clearly say what it meant by the term "appeals to prurient interest" in *Roth,* 354 U.S. at 489. If this Court is going to continue to adhere to its *Roth* definition of obscenity and not limit the federal statute to "hard-core" pornography as we urge (see *Jacobellis* v. *Ohio,* 378 U.S. 184, at 191, 200-201) then, at the very least, it should provide a workable definition of "pruriency".[15]

As we understand it, (1) "pruriency" is an "effect" element which can be measured only in terms of its impact on the average person, (2) material which appeals to prurient interest is erotically stimulating material which excites a morbid, shameful or unhealthy interest in sex, and (3) erotic stimulation of itself is

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[15] The problem of trying to define what this Court meant in *Roth* by the phrase "appeals to prurient interest" is discussed in Lockhart & McClure, *Censorship of Obscenity: The Developing Constitutional Standards,* 45 Minn. L. Rev. 5, 56-58 (1960).

not the equivalent of "pruriency".[16] If this is what this Court meant to say in *Roth*, 354 U.S. at 487, ftn. 20, it did not do so explicitly enough for the court below. On this record, none of the challenged publications had the requisite "pruriency", yet the courts below held that they were all obscene. Either the decision below is in direct conflict with this Court's decision in *Roth*, or the *Roth* definition of "pruriency" should be made more explicit.

C. The court below held that the Handbook was obscene and that there was nothing of any social importance in it (App. "A", *infra*, p. 6a), despite the fact that that it advocates ideas,[17] and experts attested to its social-scientific importance and utility (JA 210, 216-217, 261-262, 289-292, 294-315). In addition to the author's views on the importance of early sex education and female equality in sexual activity (JA 226-227), Dr. Albert Ellis[18] points out (Ex. G17, p. 8) that on the basis of the author's own sex experiences the Handbook

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[16] For varying definitions, see *Flying Eagle Publications* v. *United States*, 273 F. 2d 799, 803 (C.A. 1, 1962); *United States* v. *Keller*, 259 F. 2d 54, 58 (C.A. 3, 1958); *Big Table, Inc.* v. *Schroder*, 186 F. Supp. 254, 261 (N.D. Ill., 1960); *United States* v. *One Book Entitled "Ulysses"*, 5 F. Supp. 182, 184, aff'd 72 F. 2d 705 (C.A. 2, 1934).

[17] Although Mrs. Serett has been exceptionally frank in relating her sexual experiences, throughout the Handbook she employs accepted anatomical references rather than "gutter words", and on those occasions when reference to the anatomy is accomplished by means other than clinical phraseology, the reference serves an illustrative purpose (see, *e.g.*, Ex. G17, pp. 216-221, on the danger of double-talk to children).

[18] Dr. Ellis is the author of the following books, among others: *The Folklore of Sex* (1951); *Sex, Society and the Individual* (1953); *The American Sexual Tragedy* (1954); *The Psychology of Sex Offenders* (1956); *Sex Without Guilt* (1958); *The Art and Science of Love* (1960); *Creative Marriage* (1960); and *Sex and the Single Man* (1963).

"manages to be duly skeptical of the allegedly superlative value of simultaneous climax [*e.g.*, G17, pp. 225-227]; to emphasize the importance of focusing on sexual imagery [*e.g.*, 224-225]; to deflate the myth of 'vaginal orgasm' [*e.g.*, 225-227]; [and] to be highly dubious of the necessity of totally unplanned, 'spontaneous' coital activity [*e.g.*, 122-123] * * *." See also *Frumkin*, IX *Journal of Human Relations*, 513 (Summer 1961); Bryan, "Review of the Housewife's Handbook on Selective Promiscuity", *Journal of American Institute of Hypnosis* (January 1962) (JA 16-19). It is this fact—that the Handbook advocates ideas—that validates its claim to be tested, not by any courtroom debate over its importance, but in the marketplace of ideas. Ideological sex expression cannot be required to abide by any consensus—whether public, expert, or judicial—if it is to be free and protected by the First Amendment. *Kingsley International Pictures* v. *Regents*, 360 U.S. 684, 689. If "material dealing with sex in a manner which advocates ideas * * * may not be branded as obscenity and denied the constitutional protection" (*Jacobellis* v. *Ohio*, 378 U.S. 184, 191), it is irrelevant that the disputed "utility" issue was resolved adversely to petitioners. This is an important question of federal law which has not been, but should be, decided by this Court.

Just as the courts below erroneously refused to accord constitutional protection to the ideological sex expression contained in the Handbook, they erroneously balanced away all the socially important content of Eros (JA 362-366; App. "A", *infra*, pp. 5a-6a). Notwithstanding the fact that the indictment charged that Eros was "obscene when considered as a whole" (JA 149), the courts below suppressed the whole because they thought that parts had "prurient interest ap-

peal". This holding is in direct conflict with the views expressed by Mr. Justice Brennan in *Jacobellis* v. *Ohio*, 378 U.S. 184, 191, and with the holdings of the highest courts of California[19] and Illinois.[20]

D. The court below held (App. "A", *infra*, p. 9a) that no error was committed when the trial court over petitioners' repeated objections (JA 321, 322, 324), permitted Dr. Frignito, a Government psychiatrist, to testify as to the Handbook's effect upon adolescents (JA 321-324). The trial court accorded such testimony great, if not conclusive, weight and stated that a defense witness shocked him "by saying that this book should be in every home and available for teenagers for guidance in sex behavior, but in my opinion misbehavior" (JA 366).[21]

The holding below is in direct conflict with the holding of the Court of Appeals for the Sixth Circuit in *Volanski* v. *United States*, 246 F. 2d 842 (1957), another obscenity case tried to the district court *without a jury*. In *Volanski*, a psychiatrist was permitted "to

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[19] *Zeitlin* v. *Arnebergh*, 59 Cal. 2d 901, 31 Cal. Rptr. 800, 813.

[20] *People* v. *Bruce*, — Ill. —, 33 L. W. 2270 (Nov. 24, 1964).

[21] The trial court's concern over the Handbook's effect on adolescents (JA 271, 272, 296, 297-298, 300-307) and its admission of the Frignito testimony caused it to adopt (JA 368) the rejected "composite test" for measuring pruriency. Compare *Commonwealth* v. *Isenstadt*, 318 Mass. 543, 62 N.E. 2d 840, 845. After *Roth* v. *United States*, 354 U.S. 476, the composite test was abandoned by all courts in favor of "[t]he impact upon the average person" test. *E.g.*, *Womack* v. *United States*, 294 F. 2d 204, 205 (C.A.D.C., 1961); *Grove Press* v. *Christenberry*, 175 F. Supp. 488, 499 (SDNY, 1959), aff'd 276 F. 2d 433 (C.A. 2, 1960). "The • • • formulation of the test as a composite of all elements in society retains most of the objectionable rigor of the old Hicklin rule • • •." Lockhart & McClure, *Censorship of Obscenity: The Developing Constitutional Standards*, 45 Minn. L. Rev. 5, 72 (1960).

state his expert opinion that the pictures would have an undesirable effect upon juveniles. That the court's decision was based in large part on this evidence is revealed by the trial judge's oral opinion." *Id.*, at 843. In reversing the conviction, Judge (now Mr. Justice) Stewart said: "The admission of this evidence was prejudicial error." *Id.*, at 844. For present purposes, that case and this case are indistinguishable and the holding below is in irreconcilable conflict with *Volanski.*

E. The trial court admitted over objection letters from Frank Brady, Associate Publisher of Eros Magazine, Inc., to the postmasters of Blue Ball (Ex. G1) and Intercourse (Ex. G2) (JA 154-155, 157) and then found that *all* petitioners sought to mail from Blue Ball, Pennsylvania, from Intercourse, Pennsylvania, and finally did mail from Middlesex, New Jersey (JA 351) "in order that the postmark of [the] mailed material would further [petitioners'] general scheme and purpose" (JA 351). The indictment did not charge a conspiracy and there was no evidence of any general scheme and purpose. Evidence of "intent" cannot be transferred from one defendant to another merely because they are tried together, and the Brady letters were admissible, if at all, only against Eros Magazine, Inc. and not against Ginzburg, Liaison News Letter, Inc. or Documentary Books, Inc. Cf. *Kotteakos* v. *United States,* 328 U.S. 750, 772, 776-777.

Although conviction was based on the theory that all petitioners were engaged in a "general scheme and purpose" to commercially exploit obscenity, the court below held that the erroneous transfer of intent evidence was immaterial because petitioners stipulated that they knew the contents of the mailed publications

(App. "A", *infra*, pp. 8a-9a). Whether or not proof of a specific criminal intent (i.e., that petitioners knew the challenged materials to be obscene) is necessary,[22] "an appellate court cannot affirm a conviction erroneously secured on one theory, on the speculation that conviction would have followed if the correct theory had been applied" *Wilson* v. *United States*, 250 F. 2d 312, 325 (C.A. 9, 1957). In holding the erroneous transfer of evidence of intent to be harmless, the court below enabled petitioners' "conviction to rest on one point and the affirmance of the conviction to rest on another"—a violation of due process. *Russell* v. *United States*, 369 U.S. 749, 766. The court below decided this question in a way in direct conflict with this Court's holding in *Cole* v. *Arkansas*, 333 U.S. 196, 201-202.

F. Despite a timely request for "special findings" under Rule 23(c) of the Federal Rules of Criminal Procedure (JA 348), the trial court reserved decision on that request (JA 348, 349), entered a general finding of "guilty on all counts" (JA 349), instructed the prosecutor to prepare "proposed findings" (JA 349) which petitioners were never shown, and then adopted the prosecutor's findings fifty-four days later

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[22] Compare *Smith* v. *California*, 361 U.S. 147, 154-155, and *Morissette* v. *United States*, 324 U.S. 246, with *Rosen* v. *United States*, 161 U.S. 29, 41. Substantial portions of the opinion below deal with the Blue Ball and Intercourse incidents, the manner in which Eros was advertised, and the prices charged for the challenged publications (App. "A", *infra*, pp. 1a-2a, 5a, 7a). Such evidence would have no bearing on whether the challenged materials were intrinsically obscene, and evidence of this nature could be material only if an essential element of the crime is an intent to appeal to prurient interest for a profit. Unless this Court holds that proof of such intent is a necessary requisite for conviction, the opinion below will open the door to prejudicial use of irrelevant evidence of motive and intent.

(JA 351-353).[23] Findings made in such a manner deprived petitioners of the safeguards that a requirement of fact finding is designed to afford. *Proceedings of the Institute on Federal Rules of Criminal Procedure,* 5 FRD 183, 188-189, 199-200 (1945); *United States* v. *El Paso Natural Gas Co.,* 376 U.S. 651, 656-657; *United States* v. *Merz,* 376 U.S. 192, 199; *United States* v. *Forness,* 125 F. 2d 928, 942 (C.A. 2, 1942). By acknowledging that most of the facts were not clear and precise (JA 359) and that findings required "careful consideration * * *, detailed legal research and assistance of counsel" (JA 360), the trial judge revealed that his general finding was a visceral reaction, buttressed later by "facts" and "conclusions" he had not thought through before arriving at a verdict.

In the past five years there have been 9,932 federal criminal cases tried without juries[24] yet no court has

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[23] The trial court excused its failure to make special findings contemporaneous with the general finding on the grounds that (1) the trial judge made clear to counsel that special findings would be delayed and defense counsel did not object to the proposed procedure (JA 359) and (2) petitioners "were not precluded from submitting findings but apparently chose not to do so" (JA 360). The record shows that the trial court reserved decision on petitioners' request for special findings (JA 348, 349) and never indicated that special findings would not be made contemporaneous with a general finding until after it pronounced petitioners guilty and directed the Government to submit "proposed findings" (JA 349). The court of appeals notwithstanding (App. "A", *infra,* pp. 7a-8a), an objection subsequent to the entry of the general finding could not have enabled the trial court to cure the error. Furthermore, petitioners' timely motion for a new trial raising an objection prior to the *ex parte* submission of the Government's "proposed findings" was dismissed by the trial judge as an "afterthought" (JA 360). On the second point, we believe it unnecessary to comment upon the court's reliance on petitioners' failure to insist upon their "right" to submit proposed findings in support of the guilty verdict.

[24] *Admin. Off. of U.S. Courts Ann. Rep.,* Table D-4 (1960-1964).

spoken authoritatively on the requirements of Rule 23(c). To petitioners' knowledge, this is the first time this Court has been called upon to pass on the issue. Since the problem constantly recurs in criminal non-jury cases and is of obvious importance in the future administration of Federal criminal justice, surely the question is one this Court should decide.

G. Despite the fact that the trial court explicitly found that the Handbook and Liaison, but not Eros, were "patently offensive" and substantially exceeded customary limits of candor (JA 351-353) and that the Handbook and Eros, but not Liaison, "appealed to prurient interest" (JA 352-353),[25] the court below supplied the essential but missing findings (*i.e.*, that Eros was "patently offensive" and that Liaison "appealed to prurient interest") by inferring their existence from other findings and from the trial court's opinion (App. "A", *infra,* p. 7a). This runs counter to the evident purpose of Rule 23(c) of the Federal Rules of Criminal Procedure,[26] and raises problems of a serious constitutional dimension.

Although it is settled that an appellate court is "not at liberty to refer to the opinion for the purpose of eking out, controlling, or modifying the scope of the findings", *Stone* v. *United States,* 164 U.S. 380, 383, still unanswered is whether an appellate court in a criminal case may supply essential findings by inference. We think not. Rule 23(c) requires that the trial court make all the essential findings. Defects

[25] The trial court found that Liaison was "published for the purpose of appealing to the prurient interest of the average individual", not that Liaison had any prurient interest appeal in fact (JA 352).

[26] *Proceedings of the Institute on Federal Rules of Criminal Procedure,* 5 FRD 184, 199-200 (1945).

in the fact-finding process cannot be remedied on appeal. *Quinn* v. *United States,* 203 F. 2d 20, 25 (D.C. Cir., 1952), reversed on other grounds, 349 U.S. 155; cf. *Cole* v. *Arkansas,* 333 U.S. 196, 201-202. In view of the obvious importance of this question, and since the problem will undoubtedly recur, this Court should decide it now.

CONCLUSION

The decision below reverses the trend of this Court's obscenity decisions beginning with *Roth* v. *United States,* 354 U.S. 476, and culminating last term in the *per curiam* reversals in *Tralins* v. *Gerstein,* 378 U.S. 576, and *Grove Press* v. *Gerstein,* 378 U.S. 577. See *Larkin* v. *G. P. Putnam's Sons,* 14 N. Y. 2d 399, 404-405. If the First and Fourteenth Amendments prohibited the challenged publications in the last three cited cases from being held "obscene" under the laws of Florida and New York, the First Amendment prohibits petitioners' convictions here.

The United States Attorney (JA 371) and the Post Office Department consider this a test case and the most important federal obscenity prosecution of recent times. Unless certiorari is granted and the convictions below reversed, federal prosecutors may take the opinion below, and its affirmance of the five year sentence meted out to petitioner Ginzburg, as a signal to begin wholesale prosecutions under the federal statute. Cf. Lockhart & McClure, *Censorship of Obscenity: The Developing Constitutional Standards,* 45 Minn. L. Rev. 5, 36-37 (1960).

By reason of the foregoing, the petition for writ of certiorari should be granted.

Respectfully submitted,

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